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11 *N.A., BAC Home Loans Servicing, LP and*
12 *ReconTrust Company, N.A.*

13 UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF NEVADA

15 BRANDON M. D'HAENENS, an
16 individual,
17
18 Plaintiff,

19 vs.

20 BANK OF AMERICA, N.A.; BAC HOME
21 LOANS SERVICING, LP; RECONTRUST
22 COMPANY, N.A.; MERSCORP, INC., a
23 Virginia corporation; MORTGAGE
24 ELECTRONIC SYSTEMS, INC.,
25 subsidiary of MERSCORP, INC., a
26 Delaware corporation; et al.,

27 Defendants.

Case: 2:10-cv-00570-GMN-LRL

**RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION
AND
MOTION FOR A PROTECTIVE
ORDER OR STAY OF DISCOVERY**

28 Defendants¹ submit this response in opposition to the Plaintiff's motion to compel.
The Plaintiff's motion to compel is a bit premature, as he has yet to send any discovery
requests for defendants to even respond to in the first place. Moreover, he cannot submit
any discovery requests yet because the parties have not had a Rule 26(f) conference.
Furthermore, given that there is a motion to dismiss pending, discovery is improper in any
event. Accordingly, the Plaintiff's motion to compel should be denied. The Court should
also award the Defendants their attorneys' fees incurred in responding to the Plaintiff's
motion.

¹ "Defendants" collectively refers to ReconTrust Company, N.A. ("ReconTrust"), Bank of America, N.A. ("BOA") and BAC Home Loans Servicing, LP ("BAC").

1 This Response is based on the pleadings and papers on the Court's docket and the
2 following memorandum of points and authorities.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 **I. Discovery Has Not Begun As There Has Been No Rule 26(f) Conference**

5 "A party may not seek discovery from any source before the parties have conferred
6 as required by Rule 26(f)." Fed. R. Civ. P. 26(d). Similarly, a Rule 26(a)(1) initial
7 disclosure statement is not due until 14 days after the parties' hold a Rule 26(f) conference.
8 The parties in this case have not held a Rule 26(f) conference yet. Thus, the Defendants
9 have no obligation to produce an initial disclosure statement, and the Plaintiff has no
10 authority to request discovery from the Defendants at this time.

11 **II. There Is Nothing to Compel Production of Yet**

12 Putting aside that discovery has yet to commence, the Plaintiff's motion to compel
13 is premature because he has yet to send a discovery request to any of the Defendants.
14 Thus, there is nothing to compel the production of. *See* Fed. R. Civ. P. 37(a)(3) (motion to
15 compel proper *after* failure to make a disclosure or respond to a discovery request
16 (emphasis added)).

17 **III. Plaintiff Failed to "Meet and Confer" with the Defendants**

18 Perhaps the Plaintiff's motion could have been avoided had he met and conferred
19 with the Defendants as required prior to filing his motion to compel. Fed. R. Civ. P.
20 37(a)(1). Plaintiff never contacted the Defendants. For that reason, he failed to attach the
21 required certificate to his motion to compel. (The affidavit he filed does not discuss this
22 issue.)

23 **IV. Discovery Should Not Begin Until After a Ruling on the Motion to Dismiss**

24 The Court should not allow discovery to begin until it has ruled on Defendants'
25 motion to dismiss; this will save the Courts and the parties time and resources. Defendants
26 provided a full explanation of why Plaintiffs' complaint fails to state a claim in their
27 motion to dismiss, (Dkt. 5), and will not repeat that history again here. Courts routinely
28 stay discovery and issue protective orders when dispositive motions are pending because

1 of the risk of considerable wasted expense. *See, e.g., Wegner v. Monroe*, 282 F.3d 1068,
 2 1077 (9th Cir. 2002) (affirming district court's decision to stay discovery pending a ruling
 3 on motion to dismiss); *Wood v. McEwen*, 644 F.2d 797, 801-02 (9th Cir. 1981) (issuing
 4 protective order and suspending discovery until motions to dismiss were decided); *Turner*
 5 *Broadcasting Sys., Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997) (allowing
 6 stay of discovery where motion to dismiss pending); *Proyecto San Pablo v. Immigration*
 7 *and Naturalization Service*, 4 F.Supp.2d 881, 884 (D. Ariz. 1997) (granting granted motion
 8 to stay discovery pending resolution of the motion to dismiss) (reversed in part on other
 9 grounds). The risk of unnecessary expense is especially great here, given the breadth and
 10 number of the Plaintiff's discovery requests.

11 Moreover, Defendants' motion to dismiss raises pure issues law, making a
 12 protective order particularly appropriate here. *Turner*, 175 F.R.D. at 556 (stay of
 13 discovery appropriate where motion to dismiss raises legal issues); *White v. American*
 14 *Tobacco Co.*, 125 F.R.D. 508, 510 (D. Nev. 1989) (where no fact issues are raised by a
 15 motion to dismiss and discovery is not required to resolve the motion, "it is appropriate for
 16 the district court to stay all discovery pending the disposition of the motion to dismiss");
 17 *U.S. v. Oregon*, 470 F.3d 809, 810 n.2 (9th Cir. 2006) (*res judicata* presents a question of
 18 law); *Coates v. Kelly*, 957 F. Supp. 1080, 1082-83 (E.D. Ark. 1997) (same); *United States*
 19 *ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F. Supp. 658, 663 (D.S.D.
 20 1996) (same).

21 **V. Conclusion**

22 The Plaintiff had no basis on which to file a motion to compel. Discovery has yet to
 23 begin and he did not certify that he met and conferred with the Defendants (because he has
 24 not). The Court should deny his motion to compel, should enter an order staying
 25 discovery, and should order the Plaintiff to pay the Defendants' reasonable costs and
 26 attorneys' fees incurred in responding to his improper motion to compel. Fed. R. Civ. P.
 27 16(f), 26(g), 37.

1 DATED this 4th day of June, 2010.

2 LEWIS AND ROCA LLP

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14 CERTIFICATE OF SERVICE

15 I hereby certify that service of the foregoing document was made on the 4th day of
16 June, 2010 by depositing a copy for mailing, first class mail, postage prepaid, at Las
17 Vegas, Nevada, to the following:

18 Brandon M. D'Haenens
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21 Pro Se Plaintiff
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23 By /s/ Marie H. Mancino
24 an employee of Lewis and Roca LLP
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